

No. 15,456

IN THE

United States Court of Appeals
For the Ninth Circuit

JOSEPH L. JOY, Trustee of the Estate of
Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant,

VS.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLIDATED
DISTRIBUTORS, INC., a corporation,

Appellees.

CLOSING BRIEF IN ANSWER TO
BRIEF OF BANK OF AMERICA.

JAMES M. CONNERS,
989 Market Street, San Francisco 3, California,

LERRIGO, THUESEN, THOMPSON
& THOMPSON,

Security Bank Building, Fresno, California,

Attorneys for Appellant.

FILED

OCT 14 1957

WALLER & BAKER, CLERK

Subject Index

	Page
Supplemental statement of facts	1
Argument	2

I.

Dealings between Consolidated and Bank created an invalid trust receipt transaction	2
---	---

II.

The provisions of Civil Code Section 3440 are relevant to validate security interest of Bank	9
--	---

III.

The referee properly concluded that the Bank was estopped from asserting any better title than Consolidated	11
---	----

IV.

There was no sufficient change of possession in compliance with Civil Code Section 3440	14
---	----

V.

No reply by appellee to Part III of appellant's opening brief	15
Conclusion	16

Table of Authorities Cited

Cases	Pages
Chichester v. Commercial Credit Co., 37 Cal. App. (2d) 439	9, 10
Hendricksen v. State Subsidiary, Ltd., 3 Cal. (2d) 459	13
Ruggles v. Cannedy, 127 Cal. 290	12
Safway Steel Products, Inc. v. Lefever, 117 Cal. App. (2d) 489	11

Statutes	
Civil Code:	
Section 3014	4
Section 3440	5, 6, 9, 10, 12, 14, 16
Section 3440.1	10
Deering's 1949 Civil Code, pages 624-625	10
1925 Statutes of California, Chapter 389, pages 725-726	10
1951 Statutes of California, Chapter 1687, pages 3884-3886..	10

Texts	
18 Cal. Jur. (2d) 403	12
3 C.J.S. 241	12
31 C.J.S. (Estoppel, Section 2) 193	12

No. 15,456

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOSEPH L. JOY, Trustee of the Estate of
Miller Scraper & Mfg. Co., Inc.,
Bankrupt,

Appellant

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION and CONSOLIDATED
DISTRIBUTORS, INC., a corporation,

Appellees.

**CLOSING BRIEF IN ANSWER TO
BRIEF OF BANK OF AMERICA.**

SUPPLEMENTAL STATEMENT OF FACTS.

Before proceeding to answer the Reply Brief of Bank of America, National Trust and Savings Association, Appellant desires to comment upon the sign with letters three inches high mentioned on page 5 of the Statement of Facts of Appellee indicating the office of Consolidated Distributors, Inc. While there was such a sign on the front of the building for a period of time, this sign was removed about June 1,

1953, and for a period of about 14 months thereafter to August 2, 1954 (Tr. p. 5, line 18) when the bankrupt corporation filed its Bankruptcy Petition, there was no sign of any type indicating Consolidated had an office on the four-acre tract or any interest in the premises. The absence of any sign *after June 1, 1953* is proved by the testimony (Tr. p. 101, lines 12-32) of W. A. Reynolds, President of Consolidated. With further reference to the absence of signs bearing the name "Consolidated Distributors, Inc." *at all times* on the scrapers in question, Appellant desires to supplement his Statement of Facts by the testimony found in (Tr. p. 54, lines 7-9, Tr. p. 60, lines 17-18, Tr. p. 68, lines 29-31 and Tr. p. 134, line 31 to p. 136, line 22).

ARGUMENT.

I.

DEALINGS BETWEEN CONSOLIDATED AND BANK CREATED AN INVALID TRUST RECEIPT TRANSACTION.

Appellant, prior to answering Part I of the Reply Brief, respectfully directs the attention of the Honorable Court to the meager, if any, comment upon or discussion of Part I of Appellant's Opening Brief (pages 5-7) relating to the error of the District Court in failing to affirm the Fourth and Seventh Findings of Fact of the Bankruptcy Referee. Both Findings of Fact are supported by evidence to be found in the Transcript proving an invalid sale of the scrapers by the bankrupt corporation to Consolidated prior to its

execution of the Trust Receipts with the Bank, and the knowledge by Bank of the lack of open, notorious and continued change of possession by Consolidated. As to the absence of any right, title and interest in any scrapers by Consolidated, the Findings of Fact and Conclusions of Law of the Bankruptcy Referee were affirmed by the District Court in the portion of its Opinion set forth in (Tr. p. 35, lines 8-32 and p. 36, lines 1-11) as follows:

“As a conclusion of law from the findings of fact, the Referee found:

‘That there was no immediate or continued change of possession of said scrapers from the above bankrupt to Consolidated Distributors, Inc., or any other person, firm or corporation, as required by Section 3440 of the Civil Code of the State of California, and that since the Bank of America NTSA was aware at all times of the facts concerning said lack of change of possession, said Bank of America NTSA is estopped from claiming any better title than was (61) obtained by Consolidated Distributors, Inc., and that by reason of said lack of change of possession, said purported sale from the above bankrupt to Consolidated Distributors, Inc., was and is, void.’

Two questions are presented by this review. The first question relates to the extent and validity of any interest or title of Consolidated in the scrapers. *The Referee concluded that Consolidated had no right, title or interest because there had been no immediate or continued change of possession of the scrapers as required by Section 3440 of the Civil Code of the State of California.* The Court

has reviewed the findings made by the Referee and the transcripts of the testimony taken by the Referee. The Court is in no position to state that the findings of fact and the conclusions of law of the Referee in this respect are erroneous. Reasonable minds might reasonably disagree on the conclusions to be drawn from all of the evidence before the Referee. *This Court will therefore not disturb the findings of fact or the conclusions of the Referee insofar as they relate to any interest, right or title of Consolidated in and to the scrapers, and his findings and conclusions in that respect are affirmed.*” (Emphasis added.)

Appellant concedes that Consolidated and Bank complied with the provisions of the Uniform Trust Receipts Act. Such compliance, however, did not make the Trust Receipts in question valid as against the Trustee and creditors of Miller because of the *defective security interest* acquired by Bank from Consolidated. The Conclusion of Law (Tr. p. 16, lines 1-14) of the Bankruptcy Referee and affirmed by the District Court (Tr. p. 36, lines 7-11) that the purported sale of the scrapers by the bankrupt to Consolidated was void as to the bankrupt's creditors conclusively proves that the *derivative security interest* asserted by the Bank under its Trust Receipts is also void as to the same creditors. Merely because the Bank conformed to a Trust Receipt transaction under Civil Code Section 3014 does not validate its Trust Receipts if the alleged security interest asserted by it is void.

Pages 8 to 10 of the Reply Brief discusses the question of delivery of the scrapers and testimony and several cases are set forth. Delivery was never an issue before the Referee or the District Court. The matter litigated before the Referee was whether or not there

had been compliance with Civil Code Section 3440 by an immediate and continued change of possession by Consolidated of the scrapers purchased from Miller pursuant to the Agreement dated March 20, 1952 (Tr. pp. 191-204) and the Amendatory and Supplemental Agreement dated April 4, 1952 (Tr. pp. 204-213).

Mention is made on page 8 of the Brief of the absolute control of the scrapers by 'Consolidated purchased from Miller. Testimony on pages 149 and 169 of the Transcript clearly refutes this statement since employees of the bankrupt had access to the unfenced area *at any time* to move the scrapers to level and scrape the storage area. The following testimony is to be found on page 149 of the Transcript lines 4-23:

“Q. Was there in the area, the storage area, any so-called ‘levelling off’ or ‘scraping off’ operations carried on during the period that this contract was in effect?

A. You say was there levelling operations carried on?

Q. Yes.

A. Yes, due to erosion and where the scraper was pushed on the ground it would get rough, and so *they would clean up periodically and replace them* back on the location to make a better appearance.

Q. How much time would be involved because of the moving for that purpose?

A. Sometimes there would be two, three, or four weeks, because it would be done by Miller Scraper and Manufacturing Company to keep his premises in shape and *he would just do that (37) when he had men he wasn't using for productive purposes in the factory.*” (Emphasis added.)

Also on page 169 of the Transcript lines 23-26 the following testimony appears:

“Q. They were moved by persons under your direction?

A. *Yes, Miller Scraper and Manufacturing Company.*” (Emphasis added.)

On page 10 Appellee states that the effect of Civil Code Section 3440 between the parties was the sole issue before the District Court. This was the issue submitted to the Bankruptcy Referee and his Conclusion of Law and Order (Tr. p. 16, lines 1-19) were affirmed by the District Court. (Tr. p. 36, lines 7-11.)

While the Referee found there was no immediate rather than actual change of possession, it cannot be implied that he concluded that an actual change of possession occurred. The District Court affirmed the Finding of the Referee that there was no immediate change of possession and it follows that there was no actual change of possession required by C. C. Section 3440. Furthermore, this Code Section also requires *continued* change of possession in addition to actual change of possession, and the District Court also affirmed the Finding of the Referee that there was no *continued* change of possession.

Appellee finally asserts that the naming of the Bank in the Invoices of Miller operated to give Bank its security interest. The terms of Paragraph III (Tr. p. 207, lines 5-21) of the Amendatory and Supplemental Agreement dated April 4, 1952 set forth the fact of purchase of the scrapers by Consolidated from Miller and the passage of title from Miller to Con-

solidated. There could be no contract between Miller and the Bank for the purchase of the scrapers because Miller had contracted to deliver the same and pass title to Consolidated under the provisions of Paragraph III above-mentioned. Furthermore, the Bank had no obligation whatsoever to purchase the scrapers since there was no sale of any scrapers made by Miller to the Bank. The Bank had constructive notice of the provisions of Paragraph III of the Amendatory and Supplemental Agreement dated April 4, 1952, due to its recordation with the County Recorder of Fresno County, California (Tr. p. 213, lines 7-11). The Bank could therefore acquire no title or any security interest from Miller since under Paragraph III of the above-mentioned Agreement the latter had agreed to sell and transfer all right, title and interest in the scrapers to Consolidated. Furthermore, the testimony of W. A. Reynolds, President of Consolidated, conclusively proves that any security interest obtained by the Bank was acquired from Consolidated and not from Miller, and the security interest of the Bank came into being when the Trust Receipts were delivered to Bank by Consolidated. His testimony (Tr. p. 92, lines 9-22) is as follows:

“Q. At the time the papers were delivered to the Bank of America in Selma, at that time did they immediately withdraw funds and deposit them to the account of Miller Scraper Co.?

A. Yes.

Q. At that time did the bank retain the Trust Receipts and attached documents?

A. Yes.

Q. *At that time* you considered these articles floored?

A. Yes.

Q. You considered that you held them as trustee for the bank?

A. We did.

Q. Do you know Mr. Jess Forrest, manager of the Selma branch of the bank?

A. Yes.

Q. Is he the one your company dealt with?

A. Yes." (Emphasis added.)

Counsel for Appellee was present (Tr. p. 76, lines 6-7) at the hearing before the Bankruptcy Referee on October 14, 1954 when the above testimony of the President of Consolidated was adduced, and he made no objection to the same. At the same hearing James R. Reynolds, Assistant to the President of Consolidated, testified (Tr. p. 120, lines 4-13) substantiating the above testimony of the President of Consolidated as follows:

"Q. Specifically, with respect to each of the documents you have before you, being Exhibits A through E for the Bank of America, did you specifically take those documents to Mr. Forrest of the Bank of America?

A. To the best of my knowledge, yes, sir.

Q. And what happened when you took them to the bank?

A. They were processed according to the agreement *which we had* with the bank." (Emphasis added.)

The above testimony conclusively proves that any security interest acquired by the Bank was derived

from Consolidated and not from Miller, the Vendor of the scrapers to Consolidated, the Vendee, under Paragraph III of the Agreement dated April 4, 1952. Counsel for the Appellee also offered no objection to this substantiating testimony of James R. Reynolds. The Referee having held that the title of Consolidated was void and his ruling having been affirmed by the District Court, the derivative security interest asserted by the Bank in the scrapers in the possession of Appellant is also void. Under these circumstances the conceded delivery of scrapers by Miller to Consolidated is of no consequence, and due to the lack of factual similarity the authorities cited by Appellee on page 12 of its Brief are not in point.

II.

THE PROVISIONS OF CIVIL CODE SECTION 3440 ARE RELEVANT TO VALIDATE SECURITY INTEREST OF BANK.

Appellee contends that Civil Code Section 3440 is irrelevant and places reliance for this statement on italicized language in the excerpt from *Chichester v. Commercial Credit Co.*, 37 Cal. App. (2d) 439 on page 13 of its Brief. The Court stated, preceding the italicized language, that Civil Code Section 3440 had not been repealed. In the italicized part of its Decision the Court merely states that Trust Receipts are not governed by any existing laws relating to other types of *security interest transactions*. The Court specifically states that "Sections 3440, 2955, 2977, and 2920 of the Civil Code are still effective." It is to be noted

that C.C. 3440 was an extremely lengthy section (1925 Statutes of California, Chapter 389, pp. 725-726), when the Uniform Trust Receipts Act was adopted in 1935, and in the margin of pages 725 and 726 there is found *five different classifications* of the subject matter contained in the Section as follows: Transfers presumed fraudulent, Transfers of wine, Bulk Sales, Public Auctions, and Transfers under Order of Court. A somewhat similar classification of the contents of C.C. Section 3440 is to be found preceding the Section in Deering's 1949 Civil Code, pages 624-25. As further evidence of the broad scope of C.C. 3440, it is to be noted that the Section was divided into two parts in 1951 (1951 Statutes of California, Chapter 1687, pp. 3884-86) and the first part relating to Transfers presumed fraudulent because of lack of actual and continued possession is still designated as Civil Code Section 3440, while the balance of the former Section relating to Bulk Sales, etc., is now designated as Civil Code Section 3440.1. It is therefore evident that the italicized language in the *Chichester* case *only* pertains to any part of the Civil Code Section relating to a security interest transaction and in no way encompasses or affects the first requirements of the Section of the necessity of actual and continued change of possession in a vendee to validate a sale as against creditors of the vendor.

III.

THE REFEREE PROPERLY CONCLUDED THAT THE BANK WAS ESTOPPED FROM ASSERTING ANY BETTER TITLE THAN CONSOLIDATED.

Appellee in Part III of its Opening Brief (pages 16-18) contends that the factual situation does not justify application of the Doctrine of Equitable Estoppel. In support of this, it cites *Safway Steel Products, Inc. v. Lefever*, 117 Cal. App. (2d) 489 which defines the accepted elements of act, reliance and damage which must be proven before a true estoppel will be allowed. While the rule is clearly stated, there is absolutely no justification for its application to these facts.

The Referee has found, and the District Court affirmed, the sale from Miller to Consolidated to be void for lack of change of possession and that the Bank at all times was aware of this fact. From this, the Referee concluded it was estopped to claim any better title. Appellee was not, as it states (page 16), "estopped to assert its security interest in these scrapers"; it was merely *denied the right to assert a better title* than that of Consolidated.

The word, "estop" has long been used to describe any situation whereby one party is precluded from acting or asserting a right. Without comprehending a formal application of the Doctrine of Equitable Estoppel, many similar defences e.g., laches, ratification, waiver, election of remedies, although not estoppels in the true sense, bear such a general relationship and carry such a similar effect that they are consid-

ered as quasi-estoppels, 18 Cal. Jur. (2d) 403; 31 C.J.S. (Estoppel § 2) 193. Thus, as pointed out in 3 C.J.S. 241:

“... Although it is sometimes denominated an estoppel or equitable estoppel, the principle that equity will not permit one to rely on his own wrongful act, as against those affected by it but who have not participated in it, to support his own asserted legal title or to defeat a remedy which, except for his misconduct, would not be available, *is not an estoppel in a strict and technical sense.*” (Emphasis added.)

In the present instance California Civil Code § 3440 renders a transfer of personal property unaccompanied by an actual and continued change of possession *conclusively void* as against the transferor's creditors. The reliance of creditors is not an element, nor does the statute depend for its effect upon the presence of the formal elements of an equitable estoppel. As the Court states in *Ruggles v. Cannedy*, 127 Cal. 290 quoting from Chancellor Kent (page 297):

“... The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale and still continue to be the visible owner. The law will not stop to inquire whether there was actual fraud or not, for it is against sound policy to suffer the vendor to remain in possession. . . . It necessarily creates a secret encumbrance as to personal property, when to the world the vendor or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practice deceit upon mankind.”

In *Hendricksen v. State Subsidiary, Ltd.*, 3 Cal. (2d) 59, the vendor of personal property, left in possession by the defendant-purchaser, promptly mortgaged the property to the plaintiff. The Court in denying the purchaser the right to assert his title stated (page 60):

“Defendant, however, must yield its claim to the superior claim of plaintiffs, because it was negligent in leaving Fox in charge of both the ranch and the said livestock without any evidence of change of title to or possession of the chattels. The court below properly held that under such circumstances defendant *is estopped to assert its claim* over that of plaintiffs. (*Washington etc. Co. v. McGuire*, 213 Cal. 13, 15 (1 Pac. (2d) 437).) This is true notwithstanding the fact that the consideration for the chattel mortgage was forbearance to sue upon a preexisting debt. (*Smitton v. McCullough*, 182 Cal. 530 (189 Pac. 686).)” (Emphasis added.)

It is apparent that the Bank, knowing of the lack of change of possession, could have corrected this situation at any time. Its failure to do so rendered the sale from Miller to Consolidated absolutely and conclusively void as to the former's creditors. Allowing the Bank to assert any interest whatever in the face of this would defeat and render completely meaningless the requirement of change of possession. Such a safeguard would disappear and a seller holding possession could obtain credit on the strength of his apparent ownership while the purchaser or encumbrancer could defeat the creditor's recovery at any

time simply by coming forward with his document of title.

Considered in light of the foregoing, it is apparent that the Referee acted properly in estopping or refusing to allow the Bank from asserting any better title than that acquired by Consolidated, and this is true whether his conclusion rests upon simple equitable grounds or is compelled as the result of an estoppel created by statute.

IV.

THERE WAS NO SUFFICIENT CHANGE OF POSSESSION IN COMPLIANCE WITH CIVIL CODE SECTION 3440.

Before proceeding to answer Part IV of the Brief of Appellee, Appellant desires to make a brief comment upon the first paragraph on page 19 of the Brief concerning the District Court not being bound by the Findings of Fact of the Referee relating to change of possession of the scrapers required by Civil Code Section 3440. It is to be noted that the District Court in that portion of its Order (Tr. p. 35, lines 8-32 and p. 36, lines 1-11) appearing verbatim on pages 3-4 of the Brief, *adopted* the Conclusion of Law of the Referee based upon his Findings of Fact of lack of immediate and continued change of possession required by the Code Section.

Appellee states that if it assumes Civil Code Section 3440 is relevant, then under the two cases cited on pages 19-21 of its Brief there was a sufficient change of possession of the scrapers to comply with the re-

quirements of the Section. It is unnecessary to unduly lengthen the within Brief by commenting upon the lack of any factual similarity in either of these two cases because the District Court has affirmed the Findings of Fact, Conclusions of Law and Order of the Referee of the absence of immediate and continued change of possession of the scrapers in compliance with the Code Section. Neither the Bank nor Consolidated has taken an appeal from the Order of the District Court and hence the issue of change of possession is no longer debatable.

V.

NO REPLY BY APPELLEE TO PART III OF APPELLANT'S OPENING BRIEF.

Part III of Opening Brief of Appellant covers the argument and several authorities cited by Appellant in support of one of the errors of the District Court relative to *derivative* title from Consolidated to Bank upon which his appeal is predicated. By its failing to answer the Argument, Appellant can only assume that Appellee concedes that the authorities cited are in point, and his analysis, discussion of and comments upon the factual situation and cases support his appealing this error of the District Court.

CONCLUSION.

Appellant respectfully submits that the portion of the *inconsistent* Order appealed from of the District Court should be reversed. It affirmed the Decision of the Bankruptcy Referee that Consolidated had no valid title in any of the scrapers but, nevertheless reversed his Order adjudicating the Trust Receipts of Appellee void. No Appeal was taken by either Consolidated or the Bank from the Decision of the District Court affirming the Decision of the Bankruptcy Referee that the title of Consolidated was void because of non-compliance with Civil Code Section 3440. Since the validity of the Trust Receipts of the Bank received from Consolidated depended upon existing *valid title* in Consolidated, which was lacking, the alleged *derivative* security interest from Consolidated which the Bank asserts under its Trust Receipts is also void. In affirming the Decision of the Bankruptcy Referee that the sale of the scrapers from Miller to Consolidated was void, the District Court erred and *was inconsistent* in ruling that Consolidated could execute valid Trust Receipts to the Bank.

Appellant Bankruptcy Trustee respectfully submits that the portion of the *inconsistent* Order of the District Court adverse to Appellant should be reversed.

Dated, October 8, 1957.

Respectfully submitted,

JAMES M. CONNERS,

LERRIGO, THUESEN, THOMPSON

& THOMPSON,

Attorneys for Appellant.